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FILED
JUL 26 1982
ALEX. L. STEVAS,

82-140

CASE NO:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

ANGELO SUAREZ & JESUS COCA,

PETITIONERS,

V.

STATE OF OHIO,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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UNITED STATES OF AMERICA

QUESTIONS PRESENTED

I. WHETHER SECTION 2925.03 OF THE OHIO REVISED CODE, WHICH INCORPORATES A MANDATORY ACTUAL INCARCERATION PROVISION, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT PROVIDED IN THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

II. WHETHER SECTION 2925.03 OF THE OHIO REVISED CODE IRRATIONALLY AND UNFAIRLY GRADATES PUNISHMENT ACCORDING TO THE AGGREGATE WEIGHT OF THE SUBSTANCE INVOLVED (WITHOUT DISTINGUISHING BETWEEN THE PURE WEIGHT AND THE DILUTED WEIGHT) AND THEREBY DENIES DEFENDANTS DUE PROCESS AND EQUAL PROTECTION IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION.

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OFFICIAL AND UNOFFICIAL REPORTS

No official reports of the opinion in this case have been published. The opinion is published unofficially as State v. Suarez, No. 81 AP-723 and State v. Coca, No. 81 AP-724. (Ct. App. 10th Dis. December 31, 1981).

GROUNDS FOR JURISDICTION

The Ohio Tenth District Court of Appeals rendered its opinion herein on December 31, 1981. On April 28, 1982, the Supreme Court of Ohio overruled Petitioners Motion for leave to Appeal. Petitioners respectfully request review pursuant to 28 U.S.C.§1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law.

8TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

> Excess bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

SECTION 2925.03 OF THE OHIO REVISED CODE (PAGES, 1981)

> (A) No person shall knowingly do any of the following:

(4) Possess a controlled substance in an amount equal to or exceeding the bulk amount but in an amount less than three times the bulk amount.

(C) If the drug involved is any compound, mixture, preparation, or substance included in schedule I with the exception of marihuana or in schedule II, whoever violates this section is guilty of aggravated trafficking.

(4) Where the offender has violated division (A)(4) of this section, aggravated trafficking is a felony of the third degree and the Court shall impose a sentence of actual incarceration of eighteen months...

STATEMENT OF THE CASE

On December 3, 1980, the Grand Jury in the Court of Common Pleas, Franklin County (Columbus), Ohio, issued an indictment charging the Petitioners, Angelo Suarez and Jesus Coca, with one count of alleged violation of Section 2925.03 of the Ohio Revised Code.

On July 15, 1981 Petitioners entered a no contest plea to a felony of the third degree, a stipulated lesser offense, Section 2925.03(A)(4), O.R.C., Aggravated

Trafficking. Upon entry of the no contest plea, the trial court found Petitioners guilty and imposed sentence pursuant to Section 2925.03 (C)(4) O.R.C., which mandated actual incarceration of eighteen months. The Court further sentenced Petitioners for eighteen months to ten (10) years under Section 2929.11(B)(3), O.R.C.

Petitioners, Angelo Suarez and Jesus Coca, challenged the constitutionality of Section 2925.03(C)(4), O.R.C. by interposing their objections that the requirement of actual incarceration violated the equal protection clause of the fourteenth amendment and the eighth amendment prohibition against cruel and unusual punishment; however the trial court overruled Petitioners' objections.

On appeal, Petitioners challenged the constitutionality of Section 2925.03(C)(4) of the Ohio Revised Code. The Court of Appeals of the Tenth District Denied both as-

signments of error and affirmed the judgment of the trial court on December 31, 1981. The issue was then submitted for review to the Supreme Court of Ohio. The Supreme Court refused to review the issue on the merits and dismissed Petitioners' Motion on April 28, 1982.

ARGUMENT

I. Petitioners, Angelo Suarez and Jesus Coca, submit that the mandatory actual incarceration provision of Ohio Revised Code §2925.03 violates not only the equal protection clause of the fourteenth amendment, but also the prohibition against cruel and unusual punishment as provided by the eighth amendment.

A. The mandatory actual incarceration provision, §2925.03 O.R.C., is violative of the equal protection clause of the fourteenth amendment in that it arbitrarily and unreasonably violates Petitioners' fundamental

rights of due process and liberty. It is imperative that the Court in deliberating on the constitutionality of that statute, balance the interests of the state against the interests of those persons affected by statutory provision.

The State's interests in enacting the mandatory sentencing provision for actual incarceration must be sufficiently compelling to outweigh the Petitioners' fundamental right to liberty. The penalogical purposes of the legislature in justifying the elimination of discretionary, individualized sentencing are not rationally related to the interests of the State (deterrence and rehabilitation of offenders) and are clearly not of such compelling nature to outweigh the interests of the Petitioners in their liberty.

A statute may violate the guaranty of equal protection in either two ways: it may

be arbitrary and discriminatory on its face, or if not violative on its face, it may be applied in a discriminatory manner. Hernandez v. Texas, 347 U.S. 475 (1954). Petitioner was convicted of a third degree felony. Persons convicted of third degree felonies such as Abduction, Section 2905.02(B), O.R.C.; Bribery, Section 2921.02(E), O.R.C.; Arson, Section 2909.03(B), O.R.C. or Gross Sexual Imposition, Section 2907.05(B), O.R.C., are eligible for minimum sentences of between one and three years as prescribed by Sections 2929.11(B)(3), O.R.C. The convicted felons, if given a sentence of two to ten years, are also eligible for parole in as little as four months. Department of Rehabilitation and Corrections Rules Ch. 5120: 1-1-03(2). Defendants, on the other hand, were given a sentence of eighteen months to ten years and they will not be eligible for release from prison until at least 18 months

of actual incarceration have been served.

It is inherently discriminatory to allow persons convicted of such heineous crimes of violence as arson, abduction and gross sexual imposition the possibility of parole before their minimum sentence has been served and not allow Petitioners and others convicted of possession of illegal narcotics under Section 2925.03, O.R.C., the same treatment. Those who are convicted pursuant to Section 2925.03 are also denied the opportunity to have the sentencing judge consider personal mitigating factors, which other third degree felons have the opportunity to present for consideration. This inequality of treatment bears no ascertainable compelling relation to the seriousness of the offense and thereby violates the guaranty of equality contained in the Constitution of the United States.

B. The legislature's provision for mandatory sentencing of persons convicted

under Section 2925.03 O.R.C. to actual incarceration results in cruel and unusual punishment and is, thus, violative of the proscription of the eighth amendment as it bears no rational relationship to a permissible legislative purpose.

This Court in Gregg v. Georgia, 428 U.S. 153 (1976), held that a punishment was excessive and unconstitutional, if it (1) makes no measurable contribution to acceptable goals of punishment; or (2) is grossly out of proportion with the severity of the crime. A punishment may fail the test on either ground. Id.

One recognized major goal of punishment is rehabilitation. The Petitioners' mandatory punishment under O.R.C. §2925.03(C)(4) is disproportionate to any rational legislative purpose for rehabilitation of criminals. If Petitioners were sentenced to a term of eighteen months to ten years with the possibility of parole after four months, they

would have a viable incentive to rehabilitate themselves, which incentive may not exist under a sentence of actual incarceration of at least 18 months. Therefore, Section 2925.03 (C)(4) fails the first test as prescribed in Gregg.

Not only does the statute make no measurable contribution to acceptable goals of punishment, but it is also grossly disproportionate with the severity of the crime. Clearly, a disparity of constitutional dimensions exists between the sentence imposed and the evil to be avoided. Mandatory sentencing to actual incarceration is "unusual" punishment in that it unfairly segregates a class of criminals and imposes upon them a penalty which is grossly disproportionate to the severity of the crime. In being convicted of a third degree felony involving narcotics, Petitioners were subjected to a punishment to which an arsonist or a person convicted

of bribery would not be subjected. An arsonist convicted of a crime of violence does not receive the strict punishment of a narcotics offender. Thus, the gross disparity between the sentence prescribed by law and the evil at which it is aimed make mandatory sentencing under Section 2925.03, O.R.C. cruel and unusual punishment, violative of the eighth amendment to the Constitution of the United States.

II. Grading drug offenses and punishments according to the weight of a compound, mixture, preparation or substance which contains "any" amount of cocaine is irrational and creates unequal treatment of offenders and, thus, constitutes a denial of substantive due process and equal protection of the law.

O.R.C. §2925.03(A)(4) classifies possession of a controlled substance in an amount equal to or exceeding the bulk amount but in an amount less than three times that

amount as a felony of the third degree. By distinction, O.R.C. §2925.03(A)(6) classifies possession of a controlled substance in an amount equal to or exceeding three times the bulk amount as a felony of the second degree. The "bulk amount" of a controlled substance is defined in Ohio Revised Code §2925.01 (E)(1) as any of the following: "An amount equal to or exceeding ten grams or twenty-five unit doses of a compound, mixture, preparation, or substance which is, or which contains any amount of a Schedule I opiate or opium derivative, or cocaine..." (Emphasis added).

This gradation of offenses and the sentencing scheme imposed by §2925.03 creates inherently unequal and irrational treatment of offenders who are adjudged guilty of identical offenses. For example, under §2925.03, the sale or offer to sell of a given amount of pure cocaine and the sale or offer to sell the same amount of cocaine

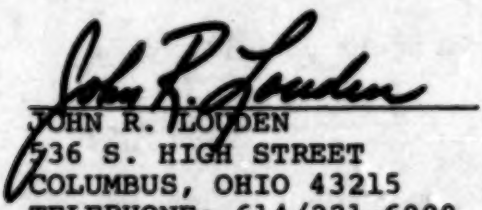
mixed with various amount of dilutant are different offenses with the sale or offer to sell the equal amount of cocaine that has been diluted carrying the heavier penalty. Thus, the statute differentiates (in terms of gradation of offenses and severity of sentences provided) between persons selling or offering to sell the same amount of a controlled substance - cocaine - on the basis of the amount of the non-controlled substance with which the cocaine is compounded, mixed or prepared. This amounts to a violation of equal protection and substantive due process under the fourteenth amendment to the Constitution of the United States.

SUMMARY

Application of the mandatory actual incarceration provision of Section 2925.03(C)(4) is patently violative of the equal protection clause and the prohibition against cruel and unusual punishment. Full review

by this Honorable Court of the mandatory actual incarceration provisions of Section 2925.03 O.R.C. as well as the gradation scheme of sentencing under O.R.C.§2925.01 so as to prevent further violations of constitutional rights would benefit greatly all involved in the criminal justice system of Ohio and other states which have adopted similar unconstitutional legislation.

Respectfully submitted,



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IN THE COURT OF APPEALS OF

FRANKLIN COUNTY, OHIO

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	
V.	:	No. 81AP-723
ANGELO SUAREZ,	:	
Defendant-Appellant.	:	
STATE OF OHIO,	:	
Plaintiff-Appellee,	:	
V.	:	No. 81AP-724
JESUS COCA,	:	
Defendant-Appellant	:	

DECISION

Rendered on December 31, 1981

MR. MICHAEL MILLER, Prosecuting Attorney
MR. ALAN C. TRAVIS, Assistant,
Franklin County Hall of Justice
369 South High Street
Columbus, Ohio,
For Plaintiffs-Appellees.

MR. JOHN R. LOUDEN,
536 South High Street,
Columbus, Ohio,
For Defendant-Appellant
Angel Suarez.

and

MR. DWIGHT A. TEEGARDIN,
502 South Third Street
Columbus, Ohio,
For Defendant-Appellant,
Jesus Coca.

McCORMAC, J.

Angel Suarez and Jesus Coca were jointly indicted with three other persons for knowingly selling or offering to sell a controlled substance included in Schedule II, commonly known as cocaine, in an amount equal to or exceeding three times the bulk amount in violation of R.C. 2925.03(A)(7). The charge was a first degree felony.

While represented by counsel, Suarez and Coca separately entered no contest pleas to the stipulated lesser included offense of aggravated trafficking of a Schedule I drug in an amount greater than bulk but less than three times bulk in violation of R.C. 2925.03(A)(4). The charge to which the no contest pleas were entered is a third degree

felony.

After hearings on the no contest pleas, the trial court found each defendant guilty of the charge to which the pleas were entered and sentenced each defendant to one-and-a-half to ten years imprisonment with 18 months actual incarceration as provided by law.

In the consolidated appeal, defendants have asserted the following assignments of error:

> 1. "The Trial Court erred in denying Defendants' motion to dismiss the indictment of Defendants on the ground that the classification of Cocaine as a narcotic, Schedule II under Ohio Revised Code Section 3719.41 and the concomitant imposition of a more severe penalty in accordance with this classification under Section 2925.03 violates the Defendants' rights of substantive due process because such classification is arbitrary, irrational and without factual basis and subjects Defendants to cruel and unusual punishment in violation of the Ohio and United States Constitutions."
>
> 2. "The Trial Court erred in denying

Defendants' motion to dismiss the indictment of Defendants on the ground that the Ohio Revised Code Section 2925.03, for which Defendants were indicted, irrationally and unfairly gradates punishment according to the aggregate weight of the substance involved (without distinguishing between the pure weight and the diluted weight) and denies the Defendants due process and equal protection of the law in violation of the Ohio and United States Constitutions."

The no contest plea hearings indicated that defendants were involved in the sale of cocaine which was represented to be 86 percent pure. The bag of cocaine, which was purchased, was analyzed by the Columbus Police Crime Laboratory and found to be cocaine of the exact weight of 68 grams. Bulk amount is 10 grams.

Defendants first contend that cocaine is improperly classified pursuant to R.C. 3719.41, as a Schedule II drug and that the classification violates the defendants' substantive due process rights because it is arbitrary, irrational and without factual

basis.

There was no evidence offered to the trial court as to the nature of cocaine and its classification, as either a Schedule I or Schedule II drug. In effect, defendants are asking this court to take judicial notice that cocaine is improperly classified as a narcotic drug. Defendants point to a recent Illinois case, People v. McCarthy (1981), 93 111. App. 3d 898, 418 N.E. 2d 26, where the court stated as follows:

> "The simple uncontradicted scientific fact is: cocaine is not a narcotic."

That finding was based upon expert evidence introduced in the case. Whether the Illinois case was correctly decided based upon the evidence before that court is not a concern of this court. It is clear, however, that the nature of cocaine is a matter of expert scientific knowledge and not a matter of which this court may take judicial notice.

Evid. R. 201 pertaining to judicial notice, provides, as pertinent, as follows:

> "(B) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonable be questions."

The determination of the properties of cocaine in relation to its classification as a narcotic drug does not come within the category of a judicially noticed fact not subject to reasonable dispute. The Illinois court made its decision based upon the evidence, not judicial notice. The Illinois court also found that classification of cocaine, although not a narcotic, as a Schedule II controlled substance is constitutional.

The only materials submitted to us to support the contention that judicial notice should be taken that cocaine is not a

narcotic and is improperly classified is the Illinois appellate decision. We cannot base judicial notice upon a factual determination from evidence in another case.

Defendants have failed to demonstrate that the Ohio General Assembly has improperly classified cocaine as a Schedule II controlled substance. Parenthetically, it is noted that cocaine is classified as a Schedule II drug under federal law and federal courts have uniformly rejected the same contention made by defendants, finding that the legislative authority had a rational basis for the classification. E.g. United States v. Marshall (9th Cir. 1976), 532 F. 2d 1279, in which the court stated that defendant's argument should be addressed to the legislature and not the courts. This court has also previously rejected defendants' argument. See State v. Badovinac unreported case No. 79AP-6, rendered on June 7, 1979 (1979 Decisions, page 1447).

Defendants further contend that the classification of cocaine as a Schedule II drug results in them being subject to cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution and Section 9, Article 1 of the Ohio Constitution. Defendants particularly refer to the 18-month mandatory incarceration provision for the crime of which defendants were found guilty. Defendants' argument is without substance. To constitute a violation of the clause against cruel and unusual punishment, the penalty must be so greatly disproportionate to the offenses as to shock the moral sense of the community. McDougle v. Maxwell (1964), 1 Ohio St. 2d 68. The General Assembly has plenary power to prescribe punishments. State v. Morris (1978), 55 Ohio St. 2d 101 (at 112). A sentence of 20 to 40 years for sale of marijuana under the former law was held by the Ohio Supreme

Court not to constitute cruel and unusual punishment. State v. Chaffin (1972), 30 Ohio St. 2d 13.

Actual incarceration is not cruel and unusual punishment per se, regardless of whether defendants have been convicted of a crime for the first time. See State v. Bonello, unreported case No. 81AP-220, rendered on September 29, 1981 (1981 Decisions, page 2992). As we said in Bonello, "[t]here was a reasonable basis for the legislature to segregate drug trafficking from other third degree felonies and to impose a provision for actual incarceration of certain drug law offenders. As the United States Supreme Court has stated, 'the comparative gravity of criminal offenses and whether their consequences are more or less injurious are matters for the state itself to determine.' Collins v. Johnston (1915), 237 U.S. 502. The General Assembly's

conclusion that drug trafficking offenses are serious enough to merit the sanction of a period of actual incarceration was a valid exercise of the legislature's power to classify offenses and assign penalties."

Finally, it is noted that defendant's pleaded to and were convicted of drug trafficking of a Schedule I drug rather than a Schedule II drug.

Defendants' first assignment of error is overruled.

Defendants next assert that R. C. 2925.03 for which defendants were indicted, irrationally and unfairly gradates punishment according to the aggregate weight of the substance involved without distinguishing between the pure weight and the diluted weight and denies the defendants' due process and equal protection in violation of the Ohio and United States Constitutions.

The offenses for which defendants were indicted and to which defendants entered

no contest pleas and were found guilty refers to the bulk amount of the drugs involved in the trafficking. R. C. 2925.01 (E)(1) defines bulk amount as follows:

> "An amount equal to or exceeding ten grams or twenty-five unit doses of a compound, mixture, preparation, or substance which is, or which contains any amount of, a schedule I opiate or opium derivative, or cocaine;"

Defendants contend that the comparison of weight of a mixture which contains a very small amount of cocaine with the same weight of pure cocaine violates equal protection and substantive due process in that the only rational method to grade the offenses under R. C. 2925.03 would be on the basis of the weight of the controlled substance contained in the mixture.

No contest pleas were entered to the charges. The lab report disclosed that the action amount obtained by the police was 68 grams, which was analyzed by the laboratory as cocaine. The testimony of the police

officer involved in the purchase was that the cocaine was represented to be 86 percent pure. There has been no showing in this case that the 68 grams contained anything less than a mixture of 86 percent cocaine.

Even if defendants are correct that it would be unfair or a violation of equal protection or due process to consider one as trafficking in large amounts of cocaine when the gross weight of the mixture was 100 grams with only one gram of pure cocaine in the mixture, that situation has not been presented in this case. Even if bulk amount was based on the amount of pure cocaine, the evidence indicates that there was more than the bulk amount in the analyzed bag.

A "party has standing to challenge the constitutionality of a statute only insofar as it has adverse impact on his own rights and as a general rule, if there is no constitutional defect in the application of a statute to a litigant, he does not have

standing to argue that statute would be unconstitutional if applied to third parties in hypothetical situations." County Court of Ulster County v. Allen (1979), 99 S.Ct. 2213, at 2223; Broadrick v. Oklahoma (1973), 413 U.S. 601, at 610. There is only a limited exception to the foregoing principal which applies to statutes which broadly prohibit speech protected by the First Amendment. That exception does not apply in this case.

Defendants' second assignment of error is overruled.

Defendants' assignments of error are overruled and the judgments of the trial court are affirmed.

Judgments affirmed.

WHITESIDE and NORRIS, JJ., concur.

IN THE COURT OF APPEALS OF

FRANKLIN COUNTY, OHIO

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	
v.	:	No. 81 AP-723
ANGEL SUAREZ,	:	
Defendant-Appellant.	:	
STATE OF OHIO,	:	
Plaintiff-Appellee,	:	
v.	:	No. 81AP-724
JESUS COCA,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on December 31, 1981, the assignments of error are overruled and it is the judgment and order of this court that the judgments of the Franklin County Court of Common Pleas are affirmed.

WHITESIDE, McCORMAC & NORRIS, JJ.

By Judge John W. McCormac /s/

cc: Alan Travis
Dwight Teegardin
John Louden

Filed: December 31, 1981 at 3:37 P.M.

-30-

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,	1982 Term
City of Columbus.	To Wit: April 28,1982
State of Ohio,	
Appellee,	No. 82-338
vs.	MOTION FOR LEAVE TO
Jesus Coca, et al.,	APPEAL FROM THE COURT
Appellants.	OF APPEALS FOR
	FRANKLIN COUNTY

It is ordered by the Court that this motion is overruled.

CERTIFICATE OF SERVICE

This will certify that all parties to be served have been served. The Office of the Prosecuting Attorney for Franklin County, Ohio was served with the re-printed Petition for Certiorari by hand delivery this 23rd day of July, 1982.

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